No. 81-2212

Office - Supreme Court, U.S.
FILED
JUN 28 1982
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

October Term, 1981

MICHAEL KAYE,
Petitioner,

v.

LUCE, FORWARD, HAMILTON & SCRIPPS;
and THEODORE W. GRAHAM,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES A. BIRD
1700 The Bank of California Plaza
110 West "A" Street
San Diego, California 92101
Telephone: (714) 236-1414
Attorney for Respondents

June 24, 1982

INTERNATIONAL PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 276-2080

QUESTIONS PRESENTED

1. Whether the Court of Appeals gravely departed from the accepted and usual course of judicial proceedings when, after conducting a hearing and receiving petitioner's written submissions, it exercised its discretion to dismiss the appeal of petitioner, a licensed attorney appearing on his own behalf, for failure to post a cost bond ordered by the District Court after motion and full opposition.

2. If the first question is answered affirmatively, whether this Court should consider issues of the merits of the case which were not considered below and, if so,

a. whether the entire matter is moot because petitioner has no liability under the District Court's judgment;

b. whether under all the circumstances petitioner had adequate notice below that respondents were seeking an award of sanctions against him;

c. whether petitioner received a fair hearing under *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), before the imposition of sanctions.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
A. Proceedings Below	1
B. Nature Of The Underlying Dispute	6
SUMMARY OF ARGUMENT	13
THE PETITION FOR CERTIORARI SHOULD BE DENIED	14
A. The Court Of Appeals Did Not Abuse Its Discretion When It Dismissed Petitioner's Appeal For Failure To Post A Cost Bond After Petitioner Repeatedly Failed To Observe Rules And Court Orders	14
B. This Court Should Not Consider Issues Which Formed No Part Of The Disposition Below	17
C. Granting Certiorari Would Only Waste Resources On Petitioner's Moot, Hollow And Meritless Contentions	18
1. Michael Kaye's Appeal Was Moot	18
2. Michael Kaye Received Fair Notice Of The Request For A Fee Award	19
3. Michael Kaye Had No Right To A Trial-Type Hearing	21
4. Michael Kaye Had No Right To Jury Trial	23
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Carder, 150 P.2d 754 (Kan. 1944) 19

Barker v. Bledsoe, 85 F.R.D. 545 (W.D. Okla. 1979).... 23

Braziller v. Lind, 32 F.R.D. 367 (S.D.N.Y. 1963) 23

California Bankers Assn. v. Shultz, 416 U.S. 21 (1974).. 19

Carr v. Grace, 516 F.2d 502 (5th Cir. 1975)..... 16

Duncan v. Louisiana, 391 U.S. 145 (1968), *reh. denied* 392 U.S. 947 (1968) 24

Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968) 24

Farmer v. Arabian American Oil Co., 285 F.2d 720 (2d Cir. 1960) 16

Glass v. Pfeffer, 657 F.2d 252 (10th Cir. 1981) 18

Hargraves v. Bowden, 217 F.2d 839 (9th Cir. 1954)..... 16

Hayden Stone, Inc. v. Brode, 508 F.2d 895 (7th Cir. 1974)..... 22

Leader Clothing Co. v. Fidelity & Casualty Co. of New York, 227 F.2d 574 (10th Cir. 1955) 19

Little v. Bowers, 134 U.S. 547 (1890)..... 19

Margoles v. Johns, 587 F.2d 885 (7th cir. 1978) 22

National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976) *reh. denied sub. nom* United States v. Janis, 429 U.S. 874 (1976)..... 22

NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)... 17

TABLE OF AUTHORITIES (Continued)

Page

CASES (Continued)

Persson v. Faestel Investments, Inc., 88 F.R.D. 668 (N.D. Ill. 1980) 22,23

Pfister v. Delta Air Lines, 496 F.Supp. 932 (N.D. Ga. 1980) 25

Powers v. Citizens Union National Bank & Trust Co., 329 F.2d 507 (6th Cir. 1964) 16

Reed v. Jones & Laughlin Steel Corp., 606 F.2d 233 (8th Cir. 1979) 15

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) ... i,4,14,17, 18,20,21, 22,23,24,25

Rothman v. Hospital Service of Southern California, 510 F.2d 956 (9th Cir. 1975) 21,23

Sager v. Moy, 9 Atl. 847 (R.I. 1887) 19

Settler v. Yakima Tribal Court, 419 F.2d 486 (9th Cir. 1969), *cert. denied* 398 U.S. 903 (1970) 16

Shapiro v. Freeman, 38 F.R.D. 308 (S.D.N.Y. 1965) 23

Smoot v. Fox, 353 F.2d 830 (6th Cir. 1965), *cert. denied sub nom.* League of Women Voters v. Smoot, 384 U.S. 909, *reh. denied* 384 U.S. 958 (1966) ... 24,25

Societe Internationale Pour Participations Industrielles, etc. v. Rogers, 357 U.S. 197 (1958) 22

Szilvassy v. United States, 71 F.R.D. 589 (S.D.N.Y. 1976) 23

TABLE OF AUTHORITIES (Continued)

Page

CASES (Continued)

Textor v. Board of Regents of Northern Illinois University, 87 F.R.D. 751 (N.D. Ill. 1980) 25

United States v. United Mine Workers, 330 U.S. 258 (1947) 24

Westinghouse Credit Corp. v. Bader & Dufty, 627 F.2d 221 (10th Cir. 1980) 15

Westinghouse Electric Corp. v. Weigel, 426 F.2d 1356 (9th Cir. 1970) 21,23

White v. New Hampshire Dept. of Employment Security, 102 S.Ct. 1162 (1982) 18

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

Judicial Code
28 U.S.C. § 1927 15,18,23,25

Rules of the Supreme Court of the United States
Rule 17 25

Federal Rules of Appellate Procedure
Rule 3(a) 16
Rule 7 14,15

Federal Rules of Civil Procedure
Rule 37 22

SECONDARY AUTHORITIES

Note, *Nemeroff v. Abelson, Bad Faith, And Awards of Attorneys' Fees*, 128 U. Pa. L. Rev. 468 (1979) .. 24

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner, an attorney appearing on his own behalf, invites this Court's attention to the self-caused procedural dismissal of his moot appeal from the consequences of his bad faith conduct in the District Court. If the Petition accurately stated the proceedings below, this case would not be made of the fiber from which decisions of this Court may be woven. Neither departures from the accepted and usual course of proceedings nor important questions of federal law reside in the record. Accurate description of the proceedings below reveals beyond argument that the Ninth Circuit's resolution of this case was correct and unremarkable from this Court's perspective.

Petitioner Michael Kaye was the seventh in a string of attorneys who represented Samuel T.H. Shen and Carolyn Jean Shen in the course of protracted proceedings in the Bankruptcy Court, Southern District of California. 6 *Excerpt of Record* 1863 (hereafter "Excerpt"). Appearing late in the proceeding, he has directed a vendetta against respondents and the San Diego federal bench ever after. These appellate proceedings result from the District Court's finding that Michael Kaye conducted the vendetta in bad faith.

The Shens first sought Chapter XII relief March 20, 1974. 6 *Excerpt* 1863. They were adjudicated bankrupts October 30, 1975. 6 *Excerpt* 1904. The Shens then filed a Chapter XI proceeding June 4, 1976, (6 *Excerpt* 1913) but were promptly adjudicated again on July 8, 1976. 6 *Excerpt* 1917. The Shens re-converted the proceeding to Chapter XII on November 21, 1977, and that status continued until dismissal. 6 *Excerpt* 1932.

The Shens voluntarily dismissed their proceeding on December 20, 1979. 2 *Excerpt* 267-279.

Respondent Theodore W. Graham was appointed full operating trustee on the day after the Shens filed the first Chapter XII petition. 6 *Excerpt* 1863. His authority was continued through the various mutations of the proceeding until his resignation. 6 *Excerpt* 1904, 1905, 1917, 1918, 1932. Respondent Luce, Forward, Hamilton & Scripps was duly appointed as Mr. Graham's counsel in the various mutations of the proceeding, although Mr. Graham did have other counsel for some purposes. 6 *Excerpt* 1870, 1906, 1933. Mr. Graham is a partner of Luce, Forward, Hamilton & Scripps.

Mr. Graham tendered his resignation as trustee in open court October 31, 1978. 6 *Excerpt* 1961. His resignation was accepted by written order November 9, 1978. 6 *Excerpt* 1962. His final discharge was entered May 18, 1979. 2 *Excerpt* 281-282.

Michael Kaye first became counsel of record for the Shens January 15, 1979 (6 *Excerpt* 1965), although he had been involved in the case for a few preceding months as an associate of one of the Shens' prior attorneys.

On April 18, 1980, Michael Kaye, on behalf of the Shens, filed in the District Court a motion to reopen the dismissed Chapter XII proceeding. 1 *Excerpt* 1. The sole purpose of the motion was to seek certain relief against respondents. There were twelve parts to the motion, seeking relief as follows:

1. reopening the proceeding
2. disqualifying Bankruptcy Judge Herbert Katz
3. compelling respondents to turn over certain records
4. inventory of allegedly intercepted mail
5. leave to bring a plenary action against respondents for invasion of privacy
6. disgorging all trustee's and attorneys' fees

7. surcharge relating to alleged losses involving certain real property

8. surcharge relating to alleged mishandling of certain litigation

9. surcharge in the amount of a $5,968.03 promissory note

10. revoking Mr. Graham's discharge

11. invalidating a general release and revoking a stipulated order terminating all disputes between respondents and the Shens

12. discipline against Mr. Graham and one of his law partners

Respondents filed their opposition to the motion to reopen on May 12, 1980. 1 *Excerpt* 129. In their responding papers respondents demanded an award of costs and attorneys' fees against the Shens and Michael Kaye. 1 *Excerpt* 159-166. Respondents also pointed out that none of the relief sought in the Shens' motion, except the reopening itself, was properly requested from the District Court in the form of the motion. 1 *Excerpt* 156-159. The Shens agreed with respondents' procedural position in a supplemental memorandum. 1 *Excerpt* 222.

The motion to reopen was first heard by District Judge Howard B. Turrentine on May 19, 1980. 6 *Excerpt* 1977. Angered by Michael Kaye's insinuations about the integrity of his chambers, Judge Turrentine disqualified himself after hearing only Michael Kaye's argument. *Transcript of Hearing* before Honorable Howard B. Turrentine, May 9, 1980, at 18-22. Chief Judge Schwartz transferred the case to District Judge Leland C. Nielsen. 6 *Excerpt* 1977.

Samuel Shen filed an affidavit to disqualify Judge Neilsen and Michael Kaye filed a certificate of good faith supporting the disqualification. 6 *Excerpt* 1718-1723. On May 27, 1980 Judge Nielsen conducted a brief hearing in which he announced that the stated bases for disqualification were untrue but recognized that he had no power to conduct an evidentiary hearing. Accordingly, he recused himself and sent the matter back to Chief Judge Schwartz. *Transcript of Hearing* before Honorable

Leland C. Nielsen, May 27, 1980, at 16. Judge Schwartz ordered that a visiting judge be assigned to hear the matter. *Transcript of Hearing* before Honorable Edward J. Schwartz, May 27, 1980, at 12.

Chief Judge Browning of the Ninth Circuit assigned District Judge William H. Orrick of the Northern District of California to hear the matter. 6 *Excerpt* 1741.

Judge Orrick conducted a hearing on July 7, 1980 and took the matter under submission. 6 *Excerpt* 1979. Both sides filed supplemental papers, respondents' limited to newly discovered evidence and Michael Kaye's of broad scope. *Id.* Judge Orrick issued his opinion September 16, 1980, and notice was given to all parties and counsel the next day. 6 *Excerpt* 1979 (docket), 6 *Excerpt* 1844 (opinion).

Judge Orrick denied the motion to reopen. Basing his decision on *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), he also granted $4,456.29 costs and $31,883.00 attorneys' fees to respondents and against the Shens and Michael Kaye, jointly and severally. 6 *Excerpt* 1858. Judgment was entered. 6 *Excerpt* 1861-1862. Appeal followed. 6 *Excerpt* 1860.

The Shens and respondents reached a compromise of the Shens' liability, and a full satisfaction of the judgment was filed. 6 *Excerpt* 1981; the Agreement is Exhibit C to appellees' Motion to Dismiss the appeal filed in the Court of Appeals November 26, 1980, and the satisfaction is Exhibit D to the same motion. Michael Kaye has no liability on the judgment, and the Shens further released him from any claims for indemnity or contribution. Exhibit C to Motion to Dismiss at page 9. Respondents moved to dismiss Michael Kaye's appeal as moot, and the motion was denied. *Order* of February 4, 1981.

On February 19, 1981 respondents filed a motion in the District Court to require Michael Kaye to post a cost bond of $25,000.00. Principally respondents sought security for attorneys' fees on appeal. Petitioner filed a 13-page memorandum in opposition and a 6-page declaration. Because

of calendar problems the motion was not heard, although Michael Kaye specifically waived oral argument. Declaration of Michael Kaye In Opposition, etc., at 4:24-26.

In July of 1981 respondents amended and renewed their motion to require a cost bond. The principal amendment was to reduce the amount requested to cover attorneys' fees, based on the actual cost of preparing their brief. Michael Kaye filed further opposition and a further declaration; again he agreed to waive oral argument.

Never before the District Court's decision on the motion did Michael Kaye submit any evidence regarding his ability to obtain a cost bond in the amount requested or in any other amount. He admitted that he could not qualify to proceed *in forma pauperis* and stated only that he lacked $25,000.00 in assets.

On October 5, 1981 the District Court issued its Memorandum and Order calling for Michael Kaye to post a cost bond of $5,000.00. The District Court specifically refused to require any security for attorneys' fees which might be awarded as costs on appeal.

Despite demand, Michael Kaye did not post the bond. He sought no reconsideration or other relief in the District Court. He sought no relief in the Court of Appeal.

At the same time, Michael Kaye was otherwise abusing the administration of justice. He missed filing deadlines, seeking post-expiration relief from the Court of Appeal. He finally filed a brief nearly thirty pages overlength and two weeks after his final deadline. The Court of Appeal rejected that brief. Michael Kaye then filed another brief, seeking an affirmative judgment for money against respondents for matters not tendered to the District Court.

On December 23, 1981 respondents served upon petitioner a motion to dismiss the appeal for failure to file the cost bond.

Michael Kaye served his opposition to the motion to dismiss and served a motion to reduce the cost bond on respondents on December 31, 1981. Although both parties knew that oral argument was scheduled in Los Angeles on January 5, 1982, Michael Kaye simply deposited his opposition and new motion in the mail to the San Francisco office of the Court of Appeals. He made no effort to file a copy of his papers in Los Angeles or with the panel members, whose names had been published.

Michael Kaye distorts the proceedings before the Court of Appeal on January 5, 1982. When the Ninth Circuit panel commenced its calendar, it inquired of Michael Kaye whether he had posted the bond or filed opposition to the motion to dismiss. Kaye explained that he had not posted the bond. He said he had filed both opposition to the motion to dismiss and his own motion to reduce the bond, but he did not have a copy with him in court. The panel heard argument -- all from Michael Kaye -- for at least fifteen minutes on the motion to dismiss and the motion to reduce. The panel ruled that the appeal would be dismissed. However, the panel also announced that it would review petitioner's written arguments and delcaration and amend or revoke its dismissal order if appropriate.

Michael Kaye petitioned for rehearing, and the Court of Appeals denied the petition. Reference is made in the Petition to this Court that respondents sought no cost judgment; a complete record would show that respondents refrained from filing a cost memorandum as part of a settlement proposal to which Michael Kaye never responded. The reference is hardly fair.

B. Nature Of The Underlying Dispute

Theodore W. Graham shouldered in 1974 the delicate and trouble-plagued task of salvaging for creditors some value from the disarrayed assets of Samuel T.H. Shen and Carolyn Jean Shen. In early 1978, the bankruptcy judge reported that the creditors had been paid because of "the near miraculous business and legal acumen of Theodore Graham, the Trustee. . . ." 1 *Excerpt* 177. The estate was not only solvent, but the

Shens had become millionaires. In July 1978, Judge Katz found in ruling on a fee application:

> Suffice it to say that at the commencement of these proceedings the debtors were insolvent in every sense of the word. Today, some four years later, all unsecured creditors have been paid in full with interest, the so called "equity-claimant" class of creditors has been satisfied, the secured creditor problems are basically resolved, and the debtors have an estate, net to them, approximating over $1 million.
>
> It cannot be gainsaid that the inflationary real estate market in Southern California was at least in part responsible for this success. However, it is also due in large measure to the efforts of Mr. Graham who undertook to resolve many of the problems facing the debtors and, in my opinion did so with a view in mind of serving the interests of his constituency, namely the creditors, while at the same time protecting the debtors. He did this in the face of numerous changes of counsel for the debtors as well as the oft evident contrariness of Mr. Shen. 2 *Excerpt* 515.

His job done, Mr. Graham resigned on October 31, 1978, and the Shens became debtors in possession. Beginning somewhat before his resignation and continuing thereafter, the efforts of Mr. Graham and his firm to obtain reasonable fees allowed under the Bankruptcy Act provoked adversarial responses from the Shens. Michael Kaye led the Shens' opposition, first as an associate of Attorney Wasserman and then on his own.

After several skirmishes, the parties signed a comprehensive settlement agreement, and a stipulated order was entered by the Bankruptcy Court. 2 *Excerpt* 239-249.

Michael Kaye approved and agreed to the stipulated order as to form *and* content; his signature identifies him as the Shens' attorney, but it appears in the form of a principal to the stipulation. 2 *Excerpt* 245.

Although the order is called stipulated, it was reached in open court during a contested hearing, the bankruptcy judge independently determined that it was fair in substance and fairly reached, and the court exercised its independent judgment to approve it. 3 *Excerpt* 608, 702, 716-717; 2 *Excerpt* 241-242. All terms of the agreement were discussed in full with the bankruptcy judge. 3 *Excerpt* 710, 716-717, 724, 728-731.

A year later Michael Kaye acknowledged when he moved to reopen the proceedings that all relief sought was barred if the release was valid. 1 *Excerpt* 49. On behalf of the Shens he alleged that the release was procured by "threats and cajolery" and that the Shens did not know the nature of the purported claims covered by the release.

The record abounds with evidence of Michael Kaye's bad faith, and it falls into three categories: proceeding against respondents upon claims which plainly lacked merit;[1] vexatiously overpleading and multiplying the proceedings by flagrantly improper tactics; and direct demonstration of ill motive.

Knowing his clients' rights turned upon the validity of the release, Michael Kaye attacked an agreement which he had approved in content, certified as to enforceability and promised not to attack. During the 1979 Bankruptcy Court hearing relating to the release, Michael Kaye said of the alleged "threats and cajolery:"

> Mr. Shen's decision is made *and I believe it will stand*, and I am not going to come back to unmake it. To the extent that it was made through Mr. Graham's influence

---

[1] Size constraints prohibit detailing the spuriousness of the charges made against respondents. After reviewing the facts the District Court found the charges to be frivolous even if the release had never been made.

> behind my back, I do protest against it. 3 *Excerpt* 714 (emphasis added).

After some concern was expressed regarding the reliability of Mr. Shen's and Michael Kaye's statements, Kaye said:

> I have stated in court today that I will not try to undo, and I will never come back to this court to undo the statements which Mr. Shen has made today in his settlement offer, if that's what is an appropriate characterization for it. If he is going to come back and undo it, it will be done by someone else other than me. 3 *Excerpt* 717.

After making that statement petitioner approved in form and content, among other things, the following findings of fact: that the release was made by free will and without undue influence, that the release was fair, and that the release was made after receiving advice of competent counsel.

Michael Kaye attacked the release and order with a declaration by Mr. Shen which, given Mr. Shen's testimony in the 1979 hearing, was either perjurious or conclusive evidence that Mr. Shen perjured himself in 1979. Michael Kaye attacked the release despite having eloquently extolled the conclusiveness and scope of a similar document when settlement had been discussed in July of 1978. 3 *Excerpt* 979-981 (quoted by Judge Orrick).

The specific underlying charges made against respondents were frivolous and vexatious in the extreme. For example, despite knowing, as early as September of 1979, that no payments had been made on a $5,968.03 promissory note to the trustee (6 *Excerpt* 1771, 1777), and despite declining the pre-settlement invitation to review the property file relating to the note, Michael Kaye unequivocally claimed in the 1980 motion to reopen that Mr. Graham had "appropriated unto himself all proceeds paid on the note." 1 *Excerpt* 47. He persisted in these allegations despite knowing that Mr. Shen was paid (through closing of a sale

of property which was security for the note) every cent due to him from the date of making the note. 1 *Excerpt* 1808-1809.

Michael Kaye's tactics were vexatious. He drove one federal judge from the bench by demanding that the judge erect a "Chinese Wall" between himself and a law clerk. *Transcript of Hearing* before Honorable Howard B. Turrentine, May 19, 1980, at 20. He was apparently unsatisfied with the judge's assurances that he could manage his chambers to exclude the law clerk from a case involving the clerk's future employer.

Michael Kaye forced the disqualification of a second federal judge by allowing his client to file, and certifying to the good faith of (6 *Excerpt* 1722-1723), an affidavit stating falsely on information and belief that the judge had a financial interest in Luce, Forward, Hamilton & Scripps and that he achieved his judgeship through the influence of one of its partners. 6 *Excerpt* 1719; *see* 6 *Excerpt* 1731, 1729-1740 and *Transcript of Hearing* before Honorable Leland C. Nielsen, May 27, 1980, at 16. Petitioner then carefully and succinctly pointed out that even if the alleged facts were absolutely false and were offered only on information and belief, the court could not question them or conduct an evidentiary hearing. 6 *Excerpt* 1725.

Vexatiousness includes the gratuitous and ridiculous charges against Bankruptcy Judge Katz and the general theme of petitioner's entire case that the federal judiciary and respondents comprise a conspiracy to do in him and the Shens. *See* 6 *Excerpt* 1778-1779. This conspiracy came to include Judge Orrick. At.Br.22:16-19.

Michael Kaye has also vexed respondents and the courts by malicious overpleading of his cause. In the District Court he repeatedly demanded criminal prosecution of respondents (1 *Excerpt* 20, 23, 26, 28, 48, 49, 56, 57; 6 *Excerpt* 1815, 1816) and the initiation of disciplinary proceedings. 1 *Excerpt* 20, 56, 57. Such relief was not appropriate in a civil proceeding

between the Shens and respondents, and the only reason for demanding it was to annoy and harass.

Finally, Michael Kaye's motives for prosecution of the motion to reopen were hate and anger, not the protection of his clients. Before the Chapter XII was dismissed, petitioner wrote a letter to the attorney for a remaining secured creditor laying out his "time bomb" strategy for dealing with the secured creditor. 6 *Excerpt* 1771-1782, "time bomb" on 1779. Essentially Kaye threatened that if the secured creditor did not make a compromise he would expand the controversy to include respondents, delay and protract the proceedings, seek to disqualify local judges and prevent the creditor from recovering anything until after a Ninth Circuit appeal. Michael Kaye's *expressed* motive for prosecuting the motion to reopen was to hinder and delay a third-party creditor. Apparently he deceived his clients into believing that the tactic was necessary or worthwhile. *See* 1 *Excerpt* 208-209.

The *real* motive for prosecuting the motion was hatred and anger. The record oozes these resentments. Mr. Graham was a "vulture." 3 *Excerpt* 1065 (July 15, 1978). Mr. Graham "plundered," "gouged" and "bled" the Shens' estate. 3 *Excerpt* 810 (February 20, 1979). The second time Michael Kaye made those statements at the February 20 hearing, the judge cautioned him about their excessiveness; Kaye merely expanded them. 3 *Excerpt* 816-818. He claimed that the Shens were "terrified of Mr. Graham and of his exploitation of the estate." 3 *Excerpt* 816.

> We can go out on F Street right now and find any number of derelicts on the street who are every bit as competent as Mr. Graham. . . . 3 *Excerpt* 831.

He suggested that Mr. Graham's purposes in administering the Shen estate were "to preserve and perpetuate the trough at which his firm was richly feasting" and "to salvage his own sinecure." 2 *Excerpt* 287 (April 13, 1979). He accused Mr. Graham of "extortion," "boondoggling" and "blackjacking" the Shens. 2 *Excerpt* 290, 294.

> The best that could be said about the trustee and his counsel in this matter is that they were hopelessly inept. (2 *Excerpt* 293)
>
> . . . .
>
> Procrastination and featherbedding by the trustee already threaten to make these proceedings a case study in fiduciary maladministration. 2 *Excerpt* 492 (August 3, 1978)

He made unsupported allegations of felony mail theft, fee fixing and profiteering. 3 *Excerpt* 672, 673, 695.

After the release was approved by Judge Katz on April 19, Mr. Shen asked the Court:

> Your honor, will you please be nice to my attorney, Mr. Michael Kaye. He is very mad, but – 3 *Excerpt* 730.

Michael Kaye's motivation of hatred and anger rings out in stunning judicial admissions made in his rejected overlength brief reproduced below (without citations) and attached as Exhibit A to respondents' brief in the Court of Appeals.

> Mr. Shen "surrendered" in disregard of the misgivings and objections of his own counsel. Appellant was angry. He was angry at Graham's circumvention and usurpation of his own role as advisor to the Shens. He was angry that Judge Katz had refused to step out of the case even though he was himself a party litigant aligned adversely to the Shens and had used Graham as his own advocate in presenting a $95,726.25 fee claim against the Shen estate.
>
> Appellant was angry at the inquisition in which Judge Katz had cooperated fully with Graham in wrenching appellant from the counsel table, stripping away his role as advocate and converting him needlessly into a witness.

> Appellant was angry at himself for failing to give the Shens more effective reassurance. He was angry at Mr. Shen for capitulating. He was angry at the sudden collapse of the case. Out of pique and bitterness and despair, appellant stated twice on the record that he would not come back to the bankruptcy court to undo what his client had done without his approval.

SUMMARY OF ARGUMENT

1. The Court of Appeals had good reason to dismiss petitioner's appeal for failure to file a cost bond. The decision of the Court of Appeals rests solely upon discretionary procedural grounds the review of which would be a complete waste of this Court's time. Petitioner's contentions are vague, but he must contend either (1) that the District Court abused its discretion on the facts in requiring a cost bond, or (2) that the District Court committed legal error in attempting to usurp the jurisdiction of the Ninth Circuit and the Court of Appeals abused its discretion on the facts in dismissing the appeal. The former contention is unworthy of this Court's attention, and immaterial because a discretionary act of the Court of Appeals was required for dismissal. The latter contention finds no support in the actions of the District Court; it is absurd in that the Ninth Circuit received, approved of and acted upon the District Court's order after hearing the same arguments from petitioner.

2. Most of the Petition is devoted to arguments on the merits which were not considered below. Nothing in the record suggests that this Court should depart from the established practice of refusing to consider matters which are not embraced in the lower court's decision.

3. The grant of certiorari for any reason would impose an absurd waste of judicial resources. Petitioner has been released by all parties from liability arising from the proceedings below. Therefore the entire matter is moot. The specific arguments on the "merits" mentioned in the

Petition either lack factual support in the record or fail to raise a significant issue of interpretation of this Court's recent decision in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), particularly in light of amendments to 28 U.S.C. § 1927 adopting the principles of *Roadway Express*.

THE PETITION FOR CERTIORARI SHOULD BE DENIED

A. The Court Of Appeals Did Not Abuse Its Discretion When It Dismissed Petitioner's Appeal For Failure To Post A Cost Bond After Petitioner Repeatedly Failed To Observe Rules And Court Orders.

Michael Kaye's appeal was dismissed on procedural grounds, and no others. His cavalier attitude toward compliance with federal procedure caused the dismissal. Petitioner now complains stridently of the District Court's original order requiring him to post a cost bond, saying little of the Court of Appeals' review of and action upon that order. His contentions regarding the cost bond -- on which he must prevail before any other matter can be considered -- lack clarity. If he is contending that the District Court abused its discretion on the facts in requiring a bond (and the Court of Appeal erred in approving that exercise of discretion) this case plainly does not merit the Supreme Court's attention. If he is contending that the District Court committed legal error in requiring the bond for the purpose of usurping the Ninth Circuit's jurisdiction, he faces two insurmountable hurdles. First, no such improper purpose appears in the District Court's order. Second, the Court of Appeals, which is perfectly capable of protecting its own jurisdiction, reviewed the same arguments by Michael Kaye and exercised its discretion to dismiss his appeal. In either event, Michael Kaye complains of a discretionary ruling of a lower court which should not attract the Supreme Court's attention.

Rule 7 of the Federal Rules of Appellate Procedure now vests in district courts the discretion to require an appellant to provide security for costs and to set the nature and amount of the security:

> The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case.

Former Rule 7 required a $250.00 bond in every case. The Advisory Committee report proposing the change stated:

> The amendment would eliminate the provision of the present rule that requires the appellant to file a $250.00 bond for costs on appeal at the time of filing his notice of appeal. The $250.00 provision was carried forward in F.R.App.P. from former Rule 73(c) of the F.R.Civ.P., and the $250.00 figure has remained unchanged since the adoption of that rule in 1937. *Today it bears no relationship to actual costs.* The amended rule would leave the question of the need for a bond for costs and its amount in the discretion of the court. (Emphasis added)

A $5,000.00 cost bond is hardly out of line. *Westinghouse Credit Corp. v. Bader & Dufty*, 627 F.2d 221, 224 (10th Cir. 1980). This case involves a massive record of over 2,000 pages, multiple motions in the Court of Appeals, briefing, an early-promised effort to take the matter to the highest court in the land and a probable award of excess costs under 28 U.S.C. § 1927 if the matter had been heard on the merits.

Michael Kaye filed multiple sets of arguments and declarations in opposition to respondents' motion for a cost bond. Weighing the evidence and applying the law, the District Court found neither petitioner nor respondents to be entirely correct. The $5,000 bond was significantly less than respondents requested, but the amount of the bond is left to the trial court's discretion. *Reed v. Jones & Laughlin Steel Corp.*, 606 F.2d 233 (8th Cir. 1979). The District Court did not in any manner consider whether Michael Kaye's appeal was frivolous or meritorious. It refused to provide security for prospective attorneys' fees. When the District Court made its order, petitioner had submitted not a

scintilla of evidence in his lengthy papers that he might not be able to afford a $5,000.00 bond.

Respondents sought dismissal of Michael Kaye's appeal not only for simple failure to file a cost bond, but for his repeated failure to respect normal procedure. Petitioner failed to seek any review in any court of the cost bond order. He repeatedly missed deadlines. He filed a defective and significantly tardy brief. He attempted to obtain relief in the Ninth Circuit which was not sought below. Considering the consistent nose-thumbing at the orderly administration of justice, the Ninth Circuit had good reason to dismiss the appeal. *Powers v. Citizens Union National Bank & Trust Co.*, 329 F.2d 507, 508-09 (6th cir. 1964); *Hargraves v. Bowden*, 217 F.2d 839, 840 (9th Cir. 1954).[2] See F.R.A.P. Rule 3(a):

> Failure of an appellant to take any step other than timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Court of Appeals deems appropriate, which may include dismissal of the appeal.

Petitioner argued to the Ninth Circuit panel at length regarding the cost bond. He submitted thick papers opposing dismissal and seeking a reduction of the bond. The Court of Appeals clearly approved the District Court's exercise of discretion. If the Court of Appeal believed its appellate jurisdiction was being usurped, as Michael Kaye suggests, it certainly could have protected that jurisdiction by its own order. The Court of Appeals exercised its own discretion to dismiss the appeal. The accepted and usual course of the administration of justice needs no assistance from this Court in this case.

---

[2] Even in this Court, petitioner's authorities are not in point. *Settler v. Yakima Tribal Court*, 419 F.2d 486, 487 n. 2 (9th Cir. 1969), *cert. denied* 398 U.S. 903 (1970) involved a supersedeas bond, and the appellant corrected the problem before the court's ruling. In *Carr v. Grace*, 516 F.2d 502, 504 (5th Cir. 1975) by the time the dismissal was requested the court had found the appeal meritorious and reversed; therefore there was nothing to be bonded. *Farmer v. Arabian American Oil Co.*, 285 F.2d 720 (2d Cir. 1960) involves a trial court cost bond, not an appeal bond.

B. This Court Should Not Consider Issues Which Formed No Part Of The Disposition Below.

The United States Supreme Court normally declines to consider claims which form no part of the decision below. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975). The Ninth Circuit dismissed Michael Kaye's appeal because of the cost bond matter without reaching any issue on the merits. Thus the great bulk of the Petition relates to issues unripe for decision.

This case hardly rises to the level of the landmark decisions in which this Court has reached out to grapple with issues of great national importance irrespective of how they were handled in lower courts. If one were to consider the merits, the case is at most a factual analysis of whether the precise elements of the notice and hearing afforded Michael Kaye gave him everything to which he was entitled. The right to notice and hearing was resolved in *Roadway Express*.

The issues petitioner attempts to raise are completely independent from the procedural basis of the dismissal. None of petitioner's issues needs to be addressed in considering whether the dismissal of the appeal was proper.

Consideration of the underlying issues in this case would be premature from both a narrow perspective and a broad policy view. Viewing the case narrowly, the Ninth Circuit has never considered the merits, so if it erred in procedure -- which it did not -- the appropriate remedy would be a remand to the Court of Appeals. Viewing the case broadly, no court of appeals has issued any decision regarding the specific procedure to be observed when *Roadway Express* claims are made.

The 1980 amendment[3] conforming 28 U.S.C. § 1927 to the principles of *Roadway Express* is also too new to have generated any significant decisional law regarding procedure.[4]

C. Granting Certiorari Would Only Waste Resources On Petitioner's Moot, Hollow And Meritless Contentions.

If any case is needed to discuss procedure under *Roadway Express, Inc. v. Piper*, this is not it. Granting certiorari to consider any issue would only involve this Court and others in further unmeritorious proceedings. Indeed, a review of Michael Kaye's arguments demonstrates not that he intends to raise procedural issues but that he believes *Roadway Express* was wrongly decided. Much of his analysis is based on a case overruled by *Roadway Express* and student commentaries critical of imposition of sanctions.

1. Michael Kaye's Appeal Was Moot.

On November 17, 1980 the Shens paid respondents $20,000.00; the Shens and respondents settled all disputes among each other. An Acknowledgement of Full Satisfaction of Judgment as against the Shens *and* Michael Kaye was filed. Both the Shens and respondents released Michael Kaye from all liability resulting from the reopening proceedings. Neither before nor after the settlement was Michael Kaye required to pay or do anything for which he could obtain recovery if the judgment were reversed.

Respondents moved to dismiss Michael Kaye's appeal as moot. The motion was denied, but it should have been granted. Among the many

---

[3] Public Law 96-349, § 3; 94 Stat. 1156.

[4] Michael Kaye's citation to *Glass v. Pfeffer*, 657 F.2d 252, 257-58 (10th Cir. 1981) is intellectually disingenuous. In that case the district court had awarded sanctions under 28 U.S.C. § 1927 before *Roadway Express*, before the statute's amendment and without any notice or hearing whatsoever. The case has also been disapproved. *White v. New Hampshire Dept. of Employment Security*, 102 S.Ct. 1162 (1982).

reasons for denying certiorari is that the dismissal is as well supported by mootness as it is by the failure to post the bond. *See California Bankers Assn. v. Shultz*, 416 U.S. 21, 71 (1974).

When a judgment debtor is no longer liable on a judgment and could not obtain a recoupment after a reversal, the debtor's appeal from the judgment is moot and must be dismissed. *Little v. Bowers*, 134 U.S. 547 (1890); *Leader Clothing Co. v. Fidelity & Casualty Co. of New York*, 227 F.2d 574, 576 (10th Cir. 1955); *see Anderson v. Carder*, 150 P.2d 754 (Kan. 1944) and *Sager v. Moy*, 9 Atl. 847 (R.I. 1887). Michael Kaye has no continuing stake in the orders below. Respondents have judicially admitted that because of the release and satisfaction he has no potential liability for malicious prosecution or abuse of process. In almost two years he has not been subjected to discipline or investigation. At most he was subjected to some adverse publicity. This Court does not sit to reverse newspapers.

2. Michael Kaye Received Fair Notice Of The Request For A Fee Award.

From the day respondents filed their first memorandum opposing the motion to reopen, Michael Kaye knew that respondents were seeking counter-relief in the form of sanctions against him for bad faith conduct. 1 *Excerpt* 159-166. Respondents' memorandum was filed May 12, 1980, almost two months before the hearing date. 1 *Excerpt* 129. The memorandum discussed in great detail the basis of the demand for sanctions. Michael Kaye was certainly aware of the request. He replied to it in part by accusing respondents of "editorial distortion" in a memorandum filed May 15, 1980. 1 *Excerpt* 222, 228-229. He declared his good faith and belief in the Shens' cause under oath the same day. 1 *Excerpt* 233, 236-237. Although respondents expected to *quantify* their cost and fee award by the bill-of-costs procedure, it was quite clear that respondents intended to seek determination of their right to the award as part of the main motion. 1 *Excerpt* 133, 165-166. Respondents' request was repeated in a supplemental memorandum filed June 30, 1980,

discussing new evidence of bad faith and the newly-decided *Roadway Express* case. 6 *Excerpt* 1743-1770. Again it was clear that respondents sought immediate determination of their right to a cost and fee award. In the June 30 memorandum respondents pointed out that Michael Kaye had *then* received adequate notice of the basis and grounds for the request for fees. 6 *Excerpt* 1746. Respondents confined their arguments at the hearing to matters of record. No new evidence was offered, nor were new allegations made.

If Michael Kaye had any doubt of the issues respondents tendered to the District Court for decision, that doubt should have been resolved when respondents' counsel made his opening remarks requesting a fee award. *Reporter's Transcript of Proceedings*, July 7, 1980 at 23-24. Although respondents requested the Court to quantify the award by the bill-of-costs procedure, Judge Orrick suggested that counsel immediately file their summary declarations regarding costs and fees. *Id.* at 24. The District Court's actions plainly indicated that both the right to a fee award and the amount of fees were taken under submission.

If Michael Kaye believed he had not received fair notice he could have done any one of at least four things:

1. Object to the filing of the declarations and to any argument on the bad-faith issue;

2. Request further argument time;

3. Request that the Court bifurcate issues and hear argument on the bad-faith issue later, either before or after deciding the main motion; or

4. File supplemental papers addressing the bad-faith issue.

Indeed, Michael Kaye did file post-argument papers of broad scope, not limited to responding to respondents' post-argument papers. 6 *Excerpt* 1811-1843. In these papers Michael Kaye mentioned neither the

procedure nor the substance of respondents' request for an award of full costs and attorneys' fees.

Respondents based their entitlement to fees entirely on the record. Michael Kaye received no evidentiary surprises at the hearing; no new allegations were made against him; respondents' arguments repeated the written submissions.

Michael Kaye had numerous opportunities to apprise the District Court of his belief -- assuming he truly had one -- that procedural error was occurring. If petitioner had made his contentions in the District Court, any procedural error could have been cured promptly. By hiding his procedural candle from the District Court, Kaye doused it. He cannot raise any error on appeal. *Westinghouse Electric Corp. v. Weigel*, 426 F.2d 1356, 1357 (9th Cir. 1970); *see Rothman v. Hospital Service of Southern California*, 510 F.2d 956, 960 (9th Cir. 1975).

3. Michael Kaye Had No Right To A Trial-Type Hearing.

Roadway Express refutes Michael Kaye's claim to a trial-type hearing. This Court remanded the case for determination in the district court of whether the conduct of Piper, Brown and Stomile "constituted or was tantamount to bad faith. . . ." *Roadway Express, Inc. v. Piper, supra*, 447 U.S. at 767. The Court did not suggest that a trial was required. Since the issue of when and how sanctions may be granted was squarely presented to this Court, it is part of the holding of *Roadway Express* that a trial is not required. Indeed, this Court commented:

> The due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers. *Id.* at 767 n.14.

The District Court based its decision upon a 2,000-page record and a full hour of argument. It was clear to everyone that the legal standard to be applied to respondents' request was "bad faith" so briefing and argument of issues of law relating to that standard were unnecessary. If

Michael Kaye had convinced the District Court that his clients' case was of some merit, that showing and his subjective statement of his good faith and belief in his clients' cause would have avoided a fee award. The hearing itself focused upon key issues of Michael Kaye's bad faith: when he knew particular facts and how he explained his approval of the release.[5] Michael Kaye has suggested no further evidence or argument he would have put before the District Court.

A party has a right to a hearing before imposition of discovery sanctions. F.R. Civ. Proc. Rule 37. However, if the matter is submitted on memoranda and the record, and the sanctioned party does not request a hearing on the sanctions, the record and memoranda are a sufficient hearing. *Hayden Stone, Inc. v. Brode*, 508 F.2d 895, 897 (7th Cir. 1974); *Persson v. Faestel Investments, Inc.*, 88 F.R.D. 668, 669-670 (N.D. Ill. 1980). Even where the discovery sanction is dismissal of a lawsuit, an evidentiary hearing is unnecessary if the record is adequate and testimony would be cumulative. *Margoles v. Johns*, 587 F.2d 885, 888-889 (7th Cir. 1978). The most serious sanctions, including dismissal, can constitutionally be applied by a trial judge without the aid of a jury or a full-blown evidentiary hearing with cross-examination. *Societe Internationale Pour Participations Industrielles v. Rogers*, 357 U.S. 197, 209-210 (1958); *see National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) *reh. denied sub nom. United States v. Janis*, 429 U.S. 874 (1976), reinstating a district court's dismissal of a complaint based on the plaintiff's bad faith in discovery. This Court in *Roadway Express* specifically contrasted the greater due process rights afforded a litigant facing dismissal in *Societe Internationale* with the lesser rights of the sanctioned attorney. *Roadway Express, Inc. v. Piper, supra*, 447 U.S. at 767 n.14. Respondents based their entitlement to fees entirely on the record. The District Court's procedure, to which Michael Kaye did not

---

[5] Unless Michael Kaye intended to defend his own good faith by showing that he was deceived by his clients, there were no inconsistencies between his position and the Shens'. By showing some merit in the Shens' claims, Kaye would have shown that he was not proceeding in bad faith.

object, was not error. Kaye's string-citations regarding the right to trial-type hearings in contempt cases are not in point.

If error occurred, Michael Kaye virtually invited it. Any procedural error could have been cured in the District Court if it had been raised, and this Court should not now consider petitioner's contentions. *Westinghouse Electric Corp. v. Weigel, supra*, 426 F.2d at 1357; *see Rothman v. Hospital Service of Southern California, supra*, 510 F.2d at 960.

4. Michael Kaye Had No Right To Jury Trial.

Just as *Roadway Express* refutes Michael Kaye's claim to a trial-type hearing, it refutes his assertion of jury rights. If this Court intended to require jury trials in fee award matters, it would have said so. Footnote 14 of *Roadway Express* makes the claim to a right to trial by jury absurd. Indeed, Michael Kaye's arguments in support of a right to jury trial show that he actually wants this Court to reverse *Roadway Express*. Such a position puts him at odds with all three co-ordinate branches of government now that the principle of *Roadway Express* has been incorporated in 28 U.S.C. § 1927.

Michael Kaye's claim of jury rights rests upon two inapt analogies while he ignores a much closer parallel. Bad faith sanctions much more closely resemble awards of fees and costs in discovery matters than they resemble criminal contempt or independent lawsuits. Awards of fees and costs are routinely made against attorneys for improper conduct in discovery. *Barker v. Bledsoe*, 85 F.R.D. 545, 549 (W.D. Okla. 1979); *Szilvassy v. United States*, 71 F.R.D. 589, 594 (S.D.N.Y. 1976); *Shapiro v. Freeman*, 38 F.R.D. 308, 312-313 (S.D.N.Y. 1965); *Braziller v. Lind*, 32 F.R.D. 367, 368 (S.D.N.Y. 1963). These sanctions are awarded by the judge hearing the discovery matter, and at least the right to sanctions is determined in conjunction with the main motion. *See, e.g., Persson v. Faestel Investments, Inc., supra*. This Court allows the most serious discovery sanctions to be imposed without trial-type hearing. (*See supra*, page 22). Obviously a jury is not required.

This Court expressly contrasted the contempt power with the inherent power to assess attorneys' fees against counsel in "narrowly defined circumstances. . . ." *Roadway Express, Inc. v. Piper, supra*, 447 U.S. at 764-765. Thus, this Court already rejected the criminal contempt analogy as a basis for a right to jury trial. As Kaye admits, there is no right to jury trial in the case of civil contempt.[6] This Court has recognized the propriety of non-purgeable compensatory civil contempt awards. *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947).

Petitioner's malicious prosecution analogy is specious. The authority for the argument is principally an overruled case and a misquoted out-of-date student comment. The case, *Smoot v. Fox*, 353 F.2d 830, 833 (6th Cir. 1965) *cert. denied sub nom. League of Women Voters v. Smoot*, 384 U.S. 909, *reh. denied* 384 U.S. 958 (1966), holds as a matter of general federal law that bad faith does not create an exception to the American Rule against recovery of attorneys' fees. Thus both in holding and rationale the case was overruled by *Roadway Express*. Michael Kaye's reference to the student note (Petition 12) omits the "If" at the beginning of a sentence and thus makes declarative that which the student intended to be conditional. Comment, *Nemeroff v. Abelson, Bad Faith, And Awards of Attorneys' Fees*, 128 U. Pa. L. Rev. 468, 482 (1979). The malicious prosecution argument is nothing but an intellectually dishonest use of authority. Petitioner succeeds at best in showing that some of the elements of the tort of malicious prosecution and some of the policies for recognizing the tort are similar to the elements of bad faith and the policies for granting fee awards. The policies supporting traffic laws and some of the elements of traffic offenses are similar to the policies for and elements of the tort of negligence, but that does not confer a right to jury trial in a traffic case. *Duncan v. Louisiana*, 391 U.S. 145, 159-162 (1968), *reh. denied* 392 U.S. 947 (1968). Among other things, the elements of damage for malicious prosecution -- including punitive damages -- are substantially different from the elements of bad faith. The degree of

---

[6] Even a criminal contempt is a petty crime for which the states need not afford jury trial. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 219-220 (1968).

scienter -- negligence, recklessness or intent -- may vary from jurisdiction to jurisdiction. The policy of vindicating the integrity of the courts is not a basis for recognizing the malicious prosecution tort. Malicious prosecution relates not at all to bad faith activities which occur during the prosecution or defense of a position in litigation which may be meritorious. *See, e.g.*, the bizarre manipulations of procedure in what might be a meritorious case in *Pfister v. Delta Air Lines*, 496 F.Supp. 932 (N.D. Ga. 1980); and *Textor v. Board of Regents of Northern Illinois University*, 87 F.R.D. 751, 754 (N.D. Ill. 1980) (jurisdictional defects in potentially meritorious case).

The real thrust of Michael Kaye's argument is that *Roadway Express* was wrongly decided. The malicious prosecution analogy was used by the *Smoot* court and some commentators to argue against the inherent power to impose sanctions. Now that Congress has specifically authorized sanctions under 28 U.S.C. § 1927, reconsideration of *Roadway Express* is hardly pertinent.

CONCLUSION

The Petition for Certiorari fails to set forth a single argument worthy of this Court's attention under the standards of Supreme Court Rule 17. It should be denied.

Respectfully submitted,

/s/
CHARLES A. BIRD
Attorney for Respondents